

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYLER MICHAEL KRUPNEK,

Defendant-Appellant.

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UNPUBLISHED

October 15, 2013

No. 306702

Saginaw Circuit Court

LC No. 09-032963-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), for which he was sentenced to a term of five years' probation, and the first nine months were to be served in jail or on the PLUS program. For the reasons discussed below, we affirm.

**I. FACTUAL BACKGROUND**

On May 8, 2009, the complainant was bicycling on the Saginaw Rail Trail when defendant passed her on his bicycle. According to her testimony, as defendant passed, he told her he was wearing a pink thong. The complainant did not look at defendant at first, but looked back to make sure he kept going. A few minutes later she felt someone coming up behind her, and she stumbled off her bike. When she stood up, defendant, now several inches from her, made some comments that she could not remember and then said in an angry and forceful voice "do you want to go back to my place with me or should I just take you right now?" Because of his proximity, the tone of his voice, and the secluded area, the complainant believed defendant intended to rape her. She recalled, however, that she was carrying a concealed handgun. She drew the gun and told defendant to leave her alone, in response to which defendant licked his lips, nodded his head, and remounted his bicycle and left. As he was leaving, the complainant could see that defendant was indeed wearing a pink thong.

## II. EXCLUSION OF MENTAL LIMITATIONS EVIDENCE

Defendant first argues that the trial court improperly excluded evidence that he had Asperger's syndrome.<sup>1</sup> Defendant concedes that the evidence was not admissible in connection with a diminished capacity defense, and does not contest the trial court's decision that the evidence did not support an insanity defense. Instead, defendant argues that the evidence was relevant to show that he was easily manipulated by the police during his interview, and that there was an innocent explanation for defendant's actions and statements on the rail trail. We disagree.

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls 'outside the range of principled outcomes.'" *Id.*, quoting *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). It is well established that the diminished capacity defense is no longer operable in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). In *Carpenter*, our Supreme Court observed that the Legislature had enacted a comprehensive statutory scheme concerning defenses based on mental illness or retardation, and held that, as a result, the diminished capacity defense is no longer available. *Id.* at 230-232, 236, 241. Before this legislative activity and *Carpenter's* interpretation of it, the diminished capacity defense allowed "a defendant, even though legally sane, to offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *Id.* at 232.

In *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008), we examined the extent that evidence of a defendant's mental capacity could be admitted at trial after the abolition of the diminished capacity defense, and held that evidence of a defendant's limited mental capacity may be admissible if the evidence makes "a fact that is of consequence to the determination of the action more or less probable without such evidence being offered to negate the specific-intent element of the charged offense." *Id.* at 353, 355-356. In *Yost*, the prosecution sought to prove

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<sup>1</sup> The United States Sixth Circuit Court of Appeals quoted the fourth edition (2000) of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, page 80, in describing "Asperger's disorder" as "characterized by 'severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities. . . . The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning. . . . The impairment in reciprocal social interaction is gross and sustained. There may be marked impairment in the use of multiple nonverbal behaviors . . . to regulate social interaction and communication. . . .'" *Jakubowski v Christ Hosp, Inc.*, 627 F3d 195, 197 n 1 (CA 6, 2010), cert den \_\_\_ US \_\_\_; 131 S Ct 3071; 180 L Ed 2d 889 (2011). The recently released fifth edition of that reference work, however, does not include Asperger's Syndrome as a distinct disorder, but rather folds that condition into the more general category of autism spectrum disorder. See Kibbie, *Maleficient or mindblind: questioning the role of Asperger's in quant hedge fund malfeasance and modeling disasters*, 49 Am Crim L Rev 367, 371 (2012).

that the defendant caused the victim to overdose on a prescription antidepressant. *Id.* at 356. In support, the prosecution pointed to defendant's statements and actions from before and after the victim's death that "suggested that [the] defendant was attempting to cover up her involvement in [the victim's] death or otherwise had a guilty conscience." *Id.* at 357. The defendant argued that the evidence about the defendant's limited mental faculties was not offered to negate intent, but instead "defendant's trial counsel wanted to place [the] defendant's statements in context so that the jury could fully and fairly determine whether [the] defendant's statements and actions were truly indicative of a guilty conscience or were merely misinterpreted by the listeners and observers who witnessed the statements and actions." *Id.* As long as the evidence was not offered to negate the intent element of the charged crime, the evidence was not barred by *Carpenter*, even though it concerned the defendant's limited mental capacity. *Id.* at 357-358.

As guided by *Yost*, we cannot conclude that there was an abuse of discretion in this case. *Yost* concerned a defendant seeking to explain post-offense conduct that was not itself criminally culpable. *Yost*, 278 Mich App at 357. In contrast, the instant defendant does not contest that he approached the complainant on the rail trail with comments that could be construed as indicative of sexually aggressive intent. Instead, defendant argues that because of his Asperger's syndrome, his innocent conduct and statements in that situation were misinterpreted as criminal conduct. In other words, that the Asperger's condition caused him to give the mere appearance that he intended to sexually assault the complainant when in reality he had no intention of harming her. Because the only purpose, then, for the evidence defendant wished to introduce was to negate the intent element of the charged offense, we conclude that the trial court did not abuse its discretion in excluding the proffered expert testimony. See *Carpenter*, 464 Mich at 239.<sup>2</sup>

### III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct when he argued that the jury could infer sexual intent from defendant's conversation, having been "not normal." Defendant asserts that the prosecutor knowingly presented the case in a false light, having successfully suppressed evidence of defendant's Asperger's condition. We disagree.

This issue is unpreserved because there was no objection to the comments now challenged. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved allegations of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id.*

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<sup>2</sup> Defendant briefly suggests that evidence of his Asperger's Syndrome was relevant to show that he was easily manipulated during the police interrogation. However, defendant fails to factually support this claim. Specifically, there was no evidence that the police manipulated defendant during the interrogation and such claim was never raised below. Defendant did move to suppress his statements from the interrogation claiming that they were made under duress because he was only 17, had limited experience with the police, and had Asperger's Syndrome, but the trial court denied the motion and defendant does not contest that ruling.

“Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Id.* at 135. Moreover, a prosecutor is “free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

Defendant argues that the outcome of this case should be controlled by *United States v Parkes*, 668 F3d 295 (CA 6, 2012). In *Parkes*, a bank fraud case, the prosecutor suggested that if the defendant were acquitted he would be allowed to keep millions of dollars obtained by his fraud. *Id.* at 306. The Sixth Circuit Court of Appeals concluded that the argument was improper because the suggestion was false, and the prosecutor showed that he knew that it was false by having earlier objected to the admission of any evidence that the money at issue had been substantially repaid. *Id.* Decisions from federal courts are not binding on this Court, but they may be consulted as persuasive authority. *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). We find little guidance in *Parkes*, however, because it is factually distinguishable. The repayment of money is a concrete and objectively verifiable matter, and in most situations, one cannot as readily perceive a person’s subjective intent. In this situation, knowing that defendant suffered from Asperger’s does not equate to knowing that defendant’s conversation, having been “not normal,” was entirely attributable to his Asperger’s and was in the context of innocent flirtation rather than stemming from sexually aggressive intentions.

Moreover, it is well-established that a prosecutor “has wide latitude in arguing the facts and reasonable inferences.” *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Prosecutorial argument need not be confined to the “blandest possible terms.” *Id.* In this case, the challenged argument was nothing more than a reasonable inference based on the facts admitted at trial. The prosecutor was not obliged to limit his argument to tread softly around properly excluded evidence regarding defendant’s Asperger’s syndrome.

### III. EVIDENCE OF OTHER BAD ACTS

Finally, defendant argues that the trial court erred in admitting, over a defense objection, evidence that he had previously been caught twice in the girls’ restroom at his high school. We disagree.

MRE 404(b) generally governs admission of evidence of bad acts. Subsection (1) provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), evidence of bad acts other than what the defendant is on trial for must be relevant and offered for a proper purpose, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502,

509; 674 NW2d 366 (2004). The trial court may provide a limiting instruction under MRE 105. *Id.*

Here, the trial court had ruled that the conduct at issue was admissible to show lack of mistake or accident, which are permissible purposes under MRE 404(b)(1). However, “[i]t is insufficient for the proponent of the evidence to merely recite one of the purposes articulated in MRE 404(b).” *Dobek*, 274 Mich App at 85. Instead, the proponent, here the prosecution, must explain how the other acts evidence is relevant, i.e., how it relates to the purposes provided. *Id.* Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Plaintiff argues that the evidence was relevant to prove defendant’s intent when he approached the complainant, and also to counter defendant’s protestations that his intentions in approaching her were innocent but misunderstood. We agree.

“Evidence of intent is relevant because it negates the reasonable assumption that the incident was an accident.” *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005). Moreover, “[t]he more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant’s act is intentional.” *Id.* (internal citation omitted). It is reasonable to infer that defendant, having earlier suffered discipline for inappropriately sneaking into the girls restroom, did not make a faux pas when he approached the complainant and made comments about “taking her now” after volunteering that he was wearing a pink thong. Defendant’s history of invading girls’ restrooms lends support to the inference that he did not accidentally or mistakenly approach the complainant and make his comments under the belief that they were completely appropriate or harmless. Accordingly, that history was probative in connection with defendant’s intent when he approached the complainant.

Finally, the probative value of the evidence could be deemed substantially outweighed by its potential for unfair prejudice, given that the evidence of defendant’s guilt was less than overwhelming. However, the trial court instructed the jury on the proper purpose for the other acts evidence, and limiting instructions can protect a defendant’s right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, the trial court’s instructions should have alleviated any danger of unfair prejudice and protected defendant’s right to a fair trial.

Affirmed.

/s/ Deborah A. Servitto  
/s/ William C. Whitbeck  
/s/ Donald S. Owens